85227-8
~~NO. 85558-7~~

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

CESAR VALADEZ CIENFUEGOS,

Respondent.

ON APPEAL FROM THE COURT OF LIMITED JURISDICTION
THE HONORABLE STEVEN C. GONZÁLEZ

REPLY BRIEF

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A. REPLY ARGUMENTS

1. MICHIGAN V. BRYANT ILLUSTRATES THAT KIRKPATRICK AND KRONICH HAVE NOT BEEN OVERRULED BY MELENDEZ-DIAZ.

The central issue in this case is whether a certified letter from the Department of Licensing contains "testimonial" statements that may not be admitted under the Confrontation Clause. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Under two recent decisions of this Court, exhibit 10 (the DOL letter) is not testimonial because it is simply a certified public record containing a summary of Cienfuegos's driving record. State v. Kronich, 160 Wn.2d 893, 161 P.3d 982 (2007); State v. Kirkpatrick, 160 Wn.2d 873, 161 P.3d 990 (2007). The superior court found, however, that Kronich and Kirkpatrick were overruled by Melendez-Diaz v. Massachusetts, 557 U.S. ___, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), and that letters like exhibit 10 are testimonial.

The State has argued on appeal that Melendez-Diaz did not overrule Washington precedent. Cienfuegos responded by arguing, *inter alia*, that exhibit 10 is testimonial because it was prepared in anticipation of litigation. In that argument, he has relied heavily on State v. Jasper, 158 Wn. App. 518, 245 P.3d 228 (2010),

review granted, ___ Wn.2d ___ (2011), a case decided after the State filed its opening brief in this case.

Jasper purported to interpret the reach of Melendez-Diaz and, importantly, in distinguishing a case from Maine[1] where the court emphasized the reliability of public records, the Jasper court said:

> . . .the United States Supreme Court has explicitly rejected . . . a reliability-based approach: "[r]eliability is an amorphous, if not entirely subjective, concept" and, thus, "the only indicium of reliability sufficiently to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Crawford, 541 U.S. at 63, 69.

Jasper, 158 Wn. App. at 532 n.6.

A very recent decision by the Supreme Court shows, however, that the Jasper court was mistaken to say that reliability is not a consideration in deciphering the border between hearsay and Confrontation Clause analysis. Michigan v. Bryant, USSC No. 09-150, slip op. filed Feb. 28, 2011 (2011 WL 676964). The Court in Bryant observed that

> Implicit in Davis is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving [an] emergency is presumably significantly diminished, the Confrontation

[1] State v. Murphy, 2010 M.E. 28, 991 A.2d 35 (2010), cert. denied, 131 S. Ct. 515 (Nov. 1, 2010). The facts in Murphy are quite similar to the facts here.

> Clause does not require such statements to be subject to the crucible of cross-examination.
>
> This logic is not unlike that justifying the excited utterance exception in the hearsay law.

Bryant, slip op. at 14. The Court then referred to other traditional hearsay exceptions -- including the business records exception -- suggesting that there were parallels between hearsay analysis and Confrontation Clause analysis. Id. at 15, n.9.

Later, in discussing the mixed motives of an assault victim, the Court observed that a seriously injured victim may not realize that statements will be used in a future prosecution. Id. at 22. The Court then noted that severe injuries "would undoubtedly also weigh on the credibility and reliability that the trier of fact would afford to the statements." Id. at 22, n.12. Again, the Court is recognizing that reliability is not irrelevant to the analysis.[2]

The dissenting justice, too, recognized that the majority had returned to reliability as a gauge of whether an alleged hearsay statement violates the Clause. Bryant, 2011 WL 676964, at *26 (". . . today's decision . . . is a gross distortion of the law-a

[2] The Court also indicates that use of wholly unreliable evidence might be a Due Process violation instead of a Confrontation Clause violation. Bryant, slip op. at 24 n.13 (citing Montana v. Egelhoff, 518 U.S. 37, 53, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) and Dutton v. Evans, 400 U.S. 74, 96-97, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) (HARLAN, J., concurring in result)).

revisionist narrative in which reliability continues to guide our Confrontation Clause . . .") (Scalia, J., dissenting).

These passages illustrate that the Jasper court prematurely announced the death of reliability as a factor in Confrontation Clause analysis. This mistake is important when analyzing whether Melendez-Diaz requires a fundamental shift in the way the Washington Supreme Court analyzes public records under the Confrontation Clause. Just as reliability is inherent in the admissibility of excited utterance-type statements, so too is it important as to the admissibility of public and business records.

Moreover, Bryant illustrates that state supreme courts can extend a Supreme Court precedent beyond its intended limits. The Court in Bryant observed that "the [Michigan] court construed Davis to have decided more than it did and thus employed an unduly narrow understanding of 'ongoing emergency' that Davis[3] does not require." Bryant, slip op. at 16. Similarly, the State has argued in this case that the superior court inappropriately extended Melendez-Diaz beyond its facts and holding. Br. of App. at 17-20. Melendez-Diaz did not hold, since the facts were not before the

[3] Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

Court, that a certificate of authenticity is testimonial if it certifies the absence of a public record. The Supreme Court has yet to decide this issue. To the extent that the superior court and Jasper say that Melendez-Diaz overruled Kronich and Kirkpatrick, those courts are mistaken. The superior court and Jasper have extended rather than applied Melendez-Diaz. The superior court should be reversed and Cienfuegos's conviction should be affirmed.

2. ANY ERROR WAS HARMLESS

Cienfuegos unleashes sound and fury on exhibit 10 (DOL certification letter) and exhibit 11 (ADR) but he says precious little about exhibit 9 (notice of suspension letter). The notice of suspension letter unequivocally established that as of March 30, 2003, Cienfuegos was prohibited from driving because he was considered a habitual traffic offender. This document alone satisfies the elements of the charged crime.

Cienfuegos says exhibit 9 "does nothing more than show that in February, 2003 DOL provided notice of a revocation that might take effect on 03-30-2003." Br. of Resp. at 18 (emphasis in original). He is mistaken. The letter says "Your driving privilege is revoked for 7 years as a habitual traffic offender." CP 459

(emphasis added). As of March 30, 2003, his license was suspended for 7 years. Although the letter refers to a process of reinstatement, there was no evidence to suggest that Cienfuegos had reinstated his license. In fact, the evidence showed that upon arrest in 2005 for this offense, Cienfuegos produced a Washington State identification card, not a driver's license. It is unfathomable that Cienfuegos would not have produced a driver's license if he had one at the time.[4] Thus, considering exhibit 9 (the notice of suspension letter) together with the fact that Cienfuegos had an ID card but not a driver's license at the time of arrest, establishes the elements of driving while license suspended in the first degree, without reference to exhibit 10 (DOL certification letter) or exhibit 11 (the ADR). Any error was harmless beyond a reasonable doubt.

Additionally, exhibit 11 (ADR) corroborated two key facts: a) that Cienfuegos's license remained suspended even after the

[4] Cienfuegos argues that his failure to produce a driver's license cannot be considered. Br. of Resp. at 21 (citing State v. Smith, 155 Wn.2d 496, 120 P.3d 559 (2005), and State v Jasper, 2010 WL 5392937 at *8). He is mistaken. The cited cases simply held that failure to produce a license may not show the reason for an earlier license suspension. But, the cases do not hold that failure to produce a license was irrelevant as to whether the defendant had a license at all. In this case, it is the latter inference, not the former, that is relevant. In other words, Cienfuegos was told in March 2003 that his license was suspended because he was a habitual traffic offender. The fact that when stopped by police two years later he produced an ID card instead of a license is evidence that he still did not have a license.

date of offense, and b) that the original suspension was triggered by habitual offender status.[5] Although it is difficult to read, exhibit 11 did corroborate these two key facts and, thus, also corroborates those facts for purposes of harmless error analysis.

Finally, Cienfuegos mischaracterizes the State's remedy argument. The point of the State's argument was simple, and relies on nothing but black letter law. When a conviction is reversed for violation of the confrontation clause, the remedy is a new trial. "[T]he Double Jeopardy Clause allows retrial when a reviewing court determines that a defendant's conviction must be reversed because evidence was erroneously admitted against him, and also concludes that without the inadmissible evidence there was insufficient evidence to support a conviction." Lockhart v. Nelson, 488 U.S. 33, 40, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988). The Clause "does not bar retrial after a reversal based on the erroneous admission of evidence if the erroneously admitted evidence

[5] Cienfuegos asserts that the State "claims Exhibit 11 cures the State's proof problem." Br. of Resp. at 18. This mischaracterizes the State's harmless error argument. On appeal, as at trial, the State used exhibit 11 only to supplement or confirm information established by exhibits 9 and 10, not as stand-alone proof of Cienfuegos's driving status.

supported the conviction." United States v. Chu Kong Yin, 935 F.2d 990, 1001 (9th Cir.1991). See also Wigglesworth v. Oregon, 49 F.3d 578, 582 (9th Cir.1995).

At a new trial, the State would be free to present live testimony about Cienfuegos's driving history and the status of his license on April 15, 2005. With such live testimony, evidence of guilt would not simply be ample, it would be overwhelming.

3. OTHER ARGUMENTS

In a single page of briefing Cienfuegos addresses the relevance of the statement that his license was "suspended/ revoked in the first degree" and the argument that evidence of speeding was erroneously admitted and so prejudicial that it demands a new trial. Br. of Resp. at 26. Cienfuegos's arguments are cursory and offer no meaningful analysis on those two points. The State relies on its original briefing to show that the superior court judge erred in holding that the trial court abused its discretion on those evidentiary rulings. Br. of App. at 27-29.

B. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to reverse the superior court and affirm Cienfuegos's convictions.

DATED this 9th day of March, 2011.

Respectfully submitted,

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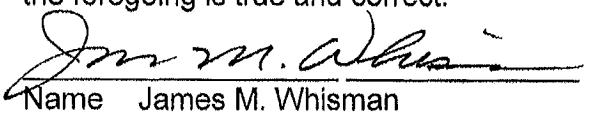
Certificate of Service by Electronic Mail

Today I sent by electronic mail to Eric Broman at Nielsen Broman & Koch, P.L.L.C., (BromanE@nwattorney.net) a copy of the Reply Brief in STATE V. CIENFUEGOS, Cause No. 85558-7, in the Supreme Court of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name James M. Whisman

3/9/11

Date 3/9/11

Done in Seattle, Washington

OFFICE RECEPTIONIST, CLERK

To: Whisman, Jim
Cc: 'Eric Broman'; Taylor, Jerry
Subject: RE: Cienfuegos, No. 85558-7

Rec. 3-9-11

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From: Whisman, Jim [mailto:Jim.Whisman@kingcounty.gov]
Sent: Wednesday, March 09, 2011 2:28 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'Eric Broman'; Taylor, Jerry
Subject: Cienfuegos, No. 85558-7

Dear Supreme Court Clerk,

Attached is a Reply Brief in State v. Cienfuegos, No. 85558-7. The Commissioner's office is currently considering motions to transfer and to strike in this case.

Please let me know if there are any difficulties with this electronic filing.

Sincerely,

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